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In the Supreme Court of the United States

OCTOBER TERM, 1976

DENNIS G. MARTIN, ADMINISTRATOR OF THE ESTATE OF HARRY EUGENE WALKER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,
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Washington, D.C. 20530.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A-1 to A-12) is reported at 546 F. 2d 1355. The opinion of the district court (Pet. App. A-13 to A-24) is reported at 392 F. Supp. 243.

JURISDICTION

The order of the court of appeals was entered on December 3, 1976, and a timely petition for rehearing was denied on January 14, 1977. The petition for a writ of certiorari was filed April 14, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether recovery by petitioner is barred by the decedent's contributory negligence.

2. Whether recovery is barred by the "discretionary function" exception to the Federal Tort Claims Act.

STATEMENT

On June 22, 1972, Harry Eugene Walker and Phillip Bradberry hitchhiked into Yellowstone National Park in the car of Vikki Searer, an employee of a Park concessionaire.[1] Because the car bore a sticker identifying the employee, it was waved through the entrance, and as a result the hitchhikers paid no entrance fee and did not receive the brochures distributed to park visitors on entry.[2] A large map, approximately 5 feet by 7 feet, posted at the entrance, depicted designated camping areas and carried the notice that "[o]vernight stopping [is] permitted only in designated campgrounds."

Searer told Walker and Bradberry, in response to their inquiry, that they would need a permit to camp and that they should go to the Ranger Station to obtain a permit. Persons who apply for such permits receive a pamphlet entitled "In Grizzly Country," a list of designated campgrounds, and a brochure on "Campground Management," and if their camping abilities warrant they are issued a back country permit and assigned to a particular site patrolled by rangers.

Walker and Bradberry did not, however, go to the Ranger Station. Instead, they found an unauthorized and isolated

[1]The facts are taken from the opinion of the court of appeals (Pet. App. A-3 to A-12).

[2]These brochures include a map of Yellowstone Park that warns of bears and other wildlife; a red folder entitled "Danger," that contains further warnings of bears; and a pamphlet about bears, entitled "Enjoy Them at a Distance," that provides specific information on how to avoid attracting bears to a campsite.

place to camp near the Old Faithful geyser.[3] They brought Searer to the campsite on June 23, and she warned them that they were in an unauthorized campsite and they would "catch hell" if caught. On the evening of June 24, the two men visited Searer at the Old Faithful Inn, where she worked. As they returned to the campsite that night, Walker was attacked by a bear and killed. The next day rangers trapped and killed a sow grizzly, No. 1792, at the campsite.

Petitioner, the administrator of Walker's estate, then brought this action for wrongful death in the United States District Court for the Central District of California, alleging negligent management of bears in the park and inadequate warnings to campers. After trial, the district court entered judgment of $87,417 for the plaintiff (Pet. App. A-13 to A-24). The court found that in 1970 and 1971 the Park Service had erred in abruptly closing garbage dumps, where bears had fed, in a manner that allegedly led the bears to rummage for food at campsites, and also that the Service had negligently failed to give Walker adequate notice of the dangers posed by the bears.

The court of appeals reversed and remanded with instructions to dismiss the complaint (Pet. App. A-12). The court held that the decision to close the garbage dumps was made at the planning rather than the operating level and therefore was within the discretionary function exception to

[3]Signs posted in that area warned visitors to stay on boardwalks due to the danger of thermal features (Exh. 5, p. 13). Despite these warnings, Walker and Bradberry left the boardwalks and pitched camp a considerable distance into the forest.

the Federal Tort Claims Act, 28 U.S.C. 2680(a).[4] The court further concluded that the district court's finding that Walker had not been contributorily negligent was clearly erroneous (Pet. App. A-9, A-12).[5]

ARGUMENT

1. Under the Federal Tort Claims Act, the United States can be held liable only if a "private person" similarly would be liable "in accordance with the law of the place where the act or omission occurred." 28 U.S.C. 1346(b). The court of appeals was correct in ruling that, on the evidence as presented to the district court, Walker was contributorily negligent and that, under Wyoming law in effect at the time of his death, his contributory negligence barred recovery

[4]28 U.S.C. 2680(a) provides:

> The provisions of this chapter and section 1346(b) of this title shall not apply to—
>
> (a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

[5]Although the court of appeals did not expressly state that the finding of inadequate warnings was clearly erroneous, such was the clear import of its opinion (Pet. App. A-11):

> To require the Park Service to post signs and warnings on every boardwalk, path or trail every few hundred feet throughout a park as extensive as Yellowstone would not only be prohibitive in cost but would destroy the park's beauty as well. To require the Park Service to search out from among the 25,000 daily visitors on the days decedent and Bradberry were in the park those two and any others who had entered the park without paying and without receiving the warning bulletins and to hold that failure to warn such individuals is actionable negligence is for the Congress and not for the courts.

(Pet. A-11 to A-12). As the court of appeals stated (Pet. App. A-11):

> * * * [I]t is clear that these two young men disregarded the advice and the warnings of Miss Searer and intentionally failed to go to the Ranger station or the Visitors' Center. Thus they avoided receiving warnings about bears, both grizzly and black. It is clear that they camped in an area which they knew was unauthorized. All of the warnings which the Park Service could devise will do no good as to persons such as decedent and Bradberry who, in effect, refuse to put themselves in contact with persons from whom they would receive advice, including warnings, and by whom they would be told not to camp at a place they seemed determined to camp.

The factual determination of contributory negligence constitutes an independent basis for the judgment below, and that determination plainly does not warrant review by this Court.[6]

2. The court of appeals correctly held that recovery is barred by the exception in the Tort Claims Act for discretionary functions. That decision does not conflict with decisions of this Court or of other courts of appeals.

[6]Petitioner's argument (Pet. 38-42) that the court of appeals misapplied Rule 52, Fed. R. Civ. P., in holding that the factual findings of the district court were clearly erroneous is without merit. The court of appeals expressly followed this Court's teachings in *United States* v. *United States Gypsum Co.*, 333 U.S. 364, 395, and found, as that case requires, a "definite and firm conviction that a mistake has been committed" (Pet. App. A-8 to A-9).

Similarly, petitioner's argument (Pet. 42-47) that the federal government owes the same duty of care under Wyoming law to all park visitors, whether they pay an entrance fee or not, is irrelevant in light of the court of appeals' decision that recovery is barred by contributory negligence.

The policy implemented in Yellowstone National Park with respect to the garbage dumps at which the bears had been feeding was a judgmental decision by National Park Service and Interior Department officials and falls squarely within the statutory exception for discretionary functions. See *Dalehite* v. *United States*, 346 U.S. 15; *Rubenstein* v. *United States*, 338 F. Supp. 654 (N.D. Cal.), affirmed, 488 F. 2d 1071 (C.A. 9); *Ashley* v. *United States*, 215 F. Supp. 39 (D. Neb.), affirmed on other grounds, 326 F. 2d 499 (C.A. 8). In *Dalehite*, the Court denied recovery on claims arising out of the explosion of a fertilizer ship, holding that the acts charged as negligent came within the exception for discretionary functions because they were made in the planning rather than the operational stages of government activity. In this case the court of appeals applied this rule in determining that the decision to close the garbage dumps, and the measures taken to prevent contacts between bears and park visitors, were made at the planning level (Pet. App. A-10):

> Superintendent Anderson, who issued the regulations and who made the decisions of which plaintiff and Dr. Craighead complain, was making a policy judgment. Even Dr. Craighead agreed at the trial that the handling of bears is a matter of judgment and someone must apply it. Similarly, we believe that the measures taken to prevent human-bear contact at this time were discretionary, as was the decision to transplant bear No. 1792 to Gibbon Meadows, 18 miles north of the Old Faithful area.
>
> We do not believe it was the intention of Congress in enacting 28 U.S.C. §2680(a) to fasten liability upon the defendant for its handling of bears generally or sow 1792 in particular when such discretion is exercised reasonably, after investigation, consultation, and reports by qualified experts in the field.

The court of appeals did not hold, as petitioner contends (Pet. 29-31), that a failure to warn a park visitor of a known dangerous condition is within the discretionary function exception. The court of appeals noted (Pet. App. A-6 to A-10) that many precautions were taken by the Park Service after the closure of the garbage dumps and found such precautions were reasonable in light of the dangers presented.[7]

Contrary to petitioner's contention (Pet. 29-35), the principles of *Dalehite* v. *United States*, *supra*, were not overruled or weakened by the Court's later decisions in *Indian Towing Co.* v. *United States*, 350 U.S. 61, and *Rayonier, Inc.* v. *United States*, 352 U.S. 315. In *Indian Towing*, the parties agreed that the discretionary function exception was not at issue; the government's contention was simply it was not liable at all for negligent performance of "uniquely governmental functions" such as lighthouse service. 350 U.S. at 64. The Court rejected this argument but specifically held *Dalehite* inapplicable to the dispute. 350 U.S. at 69. And *Rayonier* merely held that the United States could be held liable for the negligence of Forest Service firefighters. See, *e.g.*, *Maynard* v. *United States*, 430 F. 2d 1264, 1266 n. 1 (C.A. 9) ("*Indian Towing* and *Rayonier* were not concerned with the discretionary function exception to the Act but rather with the question whether the government was immune because the acts there under consideration were performed in a uniquely governmental

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[7] This case is thus distinguishable from *Smith* v. *United States*, 546 F. 2d 872 (C.A. 10), relied on by petitioner, which held that decisions to omit warnings of known dangerous conditions do not come within the exception for discretionary functions. The court in *Smith* expressly stated that it did not find the court of appeals' decision here at odds with its own conclusion, since it recognized that decisions on bear management are policy decisions and thus within the exception. 546 F. 2d at 877, n. 5-a.

capacity"); *Eastport Steamship Corp.* v. *United States*, 372 F. 2d 1002, 1010 and n. 11 (Ct. Cl.); *Blaber* v. *United States*, 332 F. 2d 629, 631 (C.A. 2) (*Indian Towing* and *Rayonier* "did not affect the scope of the discretionary function immunity"). The cases cited by petitioner (Pet. 29, 32-37) do not question the continued vitality of the *Dalehite* holding with respect to discretionary functions.[8]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submittted.

WADE H. MCCREE, JR.,
Solicitor General.

JUNE 1977.

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[8]For example, the Fifth Circuit in *Smith* v. *United States*, 375 F. 2d 243, 246, certiorari denied, 389 U.S. 841, while rejecting an "absolutist" view that the exception for discretionary functions would apply whenever "some decision-making power was exercised by the official whose act was questioned," nevertheless held that the exception applied in that case.